No. 89-1687

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

COMMUNICATIONS SATELLITE CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF LOCAL TELEPHONE COMPANIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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This *amicus* brief is filed on behalf of the United States Telephone Association (USTA) and the twenty-two Bell Operating Companies[1] with the written consent of the

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[1] The twenty-two Bell Operating Companies are: The Ameritech Operating Companies (Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.); The Bell Atlantic Companies (The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, and New Jersey Bell Telephone Company); The BellSouth Companies (Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company);

parties to this action.[2] The *amici* support the Communications Satellite Corporation's (COMSAT) Petition for a Writ of Certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit—the *COMSAT* decision (Pet. App. at 1a-2a).

STATEMENT OF INTEREST

The Bell Operating Companies provide telephone service to approximately eighty (80) percent of the telephone subscribers in the United States. The United States Telephone Association is a membership organization which represents more than 1000 telephone companies, including those that provide service to essentially all the remaining twenty (20) percent of the telephone subscribers in this country. The interest of the *amici* telephone companies is that they, like COMSAT, are subject to the Federal Communications Commission's (FCC) assertion of "ancillary authority" to adopt and enforce a retroactive ratemaking scheme for communications common carriers. *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (*New England Telephone*).

ARGUMENT

This case presents an issue that has far reaching consequences for customers of common carriers and for carriers regulated under the Communications Act, 47

The NYNEX Telephone Companies (New England Telephone and Telegraph Company and New York Telephone Company); Pacific Bell and Nevada Bell; Southwestern Bell Telephone Company; and, The U S West Telephone Companies (The Mountain States Telephone and Telegraph Company, Pacific Northwest Bell Telephone Company, and Northwestern Bell Telephone Company).

Several of those companies were intervenors in the proceeding below, but have elected to participate in this *amici* brief rather than burden the Court with two briefs in support of petitioner.

[2] *See* Supreme Court Rule 37.2. Statements of consent are on file with the Clerk of the Court.

U.S.C. §§ 151, *et seq.*, and other federal ratemaking statutes. That issue is whether a federal ratemaking agency may use its "ancillary authority" to trump the ratemaking scheme Congress laid out in the governing ratemaking statute. In *COMSAT*, the D.C. Circuit, relying on *New England Telephone*, concluded that the FCC may use its ancillary authority to engage in retroactive ratemaking. That ruling is inconsistent with a contemporaneous decision by another panel of the D.C. Circuit construing substantively identical statutory provisions of the Natural Gas Act. *See New York Public Service Comm'n v. FERC*, 866 F.2d 487 (D.C. Cir. 1989).

The number of cases involving retroactive ratemaking issues at both the agency level and circuit court level since *New England Telephone* attests to the continuing importance of this issue.[3] Yet, in the circuit where most of those agency decisions are reviewed, multiple recusals coupled with the requirement of an affirmative vote by a majority of all active D.C. Circuit judges to rehear a panel decision *en banc*[4] mean that only this Court can resolve the intra-circuit conflict. This became indisputable in February-March 1990 when the D.C. Circuit denied rehearing *en banc* in two retroactive ratemaking cases by 4 to 3 votes with 2 recusals—the *COMSAT* case

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[3] *See, e.g., Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990) (even for good cause, Commission may not ignore rule against retroactive ratemaking); *Transcontinental Gas Pipe Line Corp. v. FERC*, 866 F.2d 477, 479 (D.C. Cir. 1989) (retroactive ratemaking flatly interdicted by § 5 of Natural Gas Act); *El Paso Natural Gas Co.*, 50 FERC (CCH) ¶ 61,359 (1990); *Williston Basin Interstate Pipeline Co.*, 50 FERC (CCH) ¶ 61,284 (1990); *Texas Gas Transmission Corp.*, 50 FERC (CCH) ¶ 61,230 (1990).

At the FCC, there have been more than 100 proceedings initiated against Bell Operating Companies which rely on *New England Telephone*.

[4] *See* Handbook of Practice and Internal Procedures: United States Court of Appeals for the District of Columbia Circuit, XIII.B.2 (Aug. 1, 1987).

in which the panel upheld the FCC's exercise of retroactive ratemaking authority and *Associated Gas Distributors* which held that FERC lacked authority to engage in retroactive ratemaking. *Associated Gas Distributors v. FERC*, 898 F.2d 809 (D.C. Cir. 1990). The result is to leave the law "on a pivotal statutory issue cutting across agency lines . . . distressingly unsettled" unless and until this Court resolves that conflict.[5]

COMSAT demonstrates in its petition that the D.C. Circuit's decision is: (1) inconsistent with the regulatory scheme adopted by Congress in the Communications Act; (2) contrary to a series of D.C. Circuit decisions construing indistinguishable provisions of the Interstate Commerce Act, Federal Power Act, and Natural Gas Act; and, (3) contrary to decisions by this Court and by other circuit courts of appeals. Even though the petition for a writ of certiorari in *New England Telephone* involved those same basic issues, there are compelling reasons why the Court's denial of certiorari in that case should have no significance here.

In opposing a writ of certiorari in *New England Telephone*, the respondents argued that review would be premature, referring to two pending FCC proceedings. That argument is no longer valid:

> *First*, respondents pointed out that the FCC was "currently considering" revisions of its retroactive ratemaking (refund) policy in light of a remand in another case.[6] There has been no action by the FCC

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[5] *New England Telephone*, No. 85-1087, Order Denying Rehearing *En Banc* (D.C. Cir. Nov. 2, 1988) (Starr, J. dissenting) (Pet. App. 78a).

[6] Brief for Federal Respondents in Opposition to Certiorari at 29, *Southwestern Bell Tel. Co. v. FCC*, 109 S. Ct. 1942 (1989) (No. 88-1249). The referenced case was *American Telephone and Telegraph Co. v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988), which struck down the FCC's new automatic refund rules as inconsistent with the agency's rate of return prescription.

in the remanded proceeding, and none is expected. What the FCC has done, however, is to use the *COMSAT* and the related *New England Telephone* rationale to stretch further its "ancillary authority" to engage in retroactive ratemaking. In addition to requiring refunds where a telephone company's overall return exceeds the Commission's target return level, the FCC has ruled that a telephone company is liable for retroactive refunds when its reported return for an individual service category exceeds the target return, even though the company's overall return is within or below the zone of reasonableness set by the Commission.[7]

Second, the respondents argued that the "continuing significance of the question of refunds to enforce rate of return prescriptions is at present uncertain" due to the FCC's pending proposal to substitute "price cap" (incentive) regulation for rate of return regulation.[8] Prior to the *COMSAT* and *New England Telephone* decisions, the FCC's proposed price cap plan had no retroactive ratemaking provision. Now, the FCC has under active consideration the inclusion of a retroactive ratemaking feature in its price cap plan for local telephone companies.[9]

Pointing to the two open proceedings at the time *New England Telephone* was presented to the Court, the respondents stated that "there will be more appropriate

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[7] *See, e.g., MCI Telecomm. Corp. v. Pacific Northwest Bell Tel. Co., et al.*, 5 FCC Rcd 216 (1990), *recon. pending* and *appeal docketed* No. 90-9510 (10th Cir. Mar. 6, 1990); *Investigation of Special Access Tariffs of Local Exchange Carriers*, 5 FCC Rcd 412 (1990), *recon. pending* and *appeal docketed* No. 90-3146 (6th Cir. Feb. 21, 1990); *see also* FCC decisions listed in note 51 in COMSAT's petition.

[8] Brief for Federal Respondents in Opposition to Certiorari at 28, *Southwestern Bell Tel. Co. v. FCC*, 109 S. Ct. 1942 (1989) (No. 88-1249).

[9] *Policy and Rules Concerning Rates for Dominant Carriers*—Supplemental Notice of Proposed Rulemaking, 5 FCC Rcd 2176 (1990).

occasions to review the question if it proves to be of continuing importance." [10]

The "question" of retroactive refunds has proven to be "of continuing importance." It has become entrenched policy in the FCC's rate of return regulatory scheme. It is very much alive in the FCC's current price cap proposal for local telephone companies. The *COMSAT* case squarely presents the clear-cut legal issue of such retroactive ratemaking and, thus, warrants consideration by the Court at this time.

In passing upon COMSAT's petition, the Court should also bear in mind several factors in addition to those presented by COMSAT:

1. The D.C. Circuit's decision violates the fundamental notion that rate regulation is intended and designed to achieve the results which would occur if service were provided under free, fair and normal competition.[11] Rate regulation entails regulatory risks; but, until now, one of those risks has not been the retroactive adjustment of tariff rates that the FCC allowed to go into effect after expiration of the public notice period.

As the D.C. Circuit observed in a decision handed down after its *COMSAT* decision:

> The rule against retroactive ratemaking also tends to make this highly regulated market approximate ordinary ones, where, for example, General Motors

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[10] Brief for Federal Respondents in Opposition to Certiorari at 29, *Southwestern Bell Tel. Co. v. FCC*, 109 S. Ct. 1942 (1989).

[11] *See* Leventhal, *Vitality of the Comparable Earnings Standard for Regulation of Utilities in a Growth Economy*, 74 Yale L.J. 989, 990 (1965); Report of the Committee on the Progress in Public Utility Regulation, NARUC, Proceedings of the Fifty-Third Annual Convention at 369 (1942) ("The purpose of [rate of return regulation] . . . is to stimulate and substitute the effects of competition and give the consumer the benefits which would be derived from a system of competition.").

> may not, after a sale, demand another $500 to cover costs, and a buyer may not demand a refund because he has just discovered that a competitor had been offering similar cars for less.

California Public Utilities Comm'n v. FERC, 894 F.2d 1372, 1383 (D.C. Cir. 1990), *rehearing en banc denied*, 1990 WL 62000 (D.C. Cir. May 10, 1990).

2. In adopting ratemaking statutes, Congress recognized that predictability and certainty respecting tariff rates serve the best interests of both carriers and customers.[12] Stability and predictability are important for several reasons. *First*, the overhang of possible retroactive adjustments severely compromises the telephone companies' ability to plan, finance and implement the provision of communications services to the homes and businesses of America in the most efficient, least costly manner. *Second*, instability and uncertainty increase risk and, thus, the return that telephone company investors would demand on their investment—the greater the risk, the higher the rate of return that the ratemaking agency must allow. Higher costs of capital, in turn, would result in higher rates for consumers.

In sum, the issues raised in the COMSAT petition are important. They are important not only because the D.C. Circuit's decision is legally untenable, but also because the FCC is proceeding in multiple actions in reliance on the "ancillary authority" upheld in that decision with the ultimate result being to adversely affect COMSAT

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[12] *See Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 492-93 (D.C. Cir. 1985) (opinion by Scalia, J.), *referencing Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). Congress thought it ensured predictability and certainty with respect to communications common carriers when it enacted Sections 201-205 of the Communications Act which embrace the rule against retroactive ratemaking. *See TRT Telecomm. Corp. v. FCC*, 857 F.2d 1535, 1546 (D.C. Cir. 1988).

and the other telecommunications common carriers regulated by the Commission, and their customers.

CONCLUSION

For these reasons, and for the reasons set out in COMSAT's petition, the Court should grant the petition for a Writ of Certiorari.

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